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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 800

NORWICH, CONNECTICUT, PRINTING SPECIALTIES AND PAPER PRODUCTS UNION, LOCAL NO. 494 and INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS' UNION OF NORTH AMERICA, AFL-CIO, *Petitioners*,

v.

BOYD LEEDOM, ET AL., Individually and as Chairman and as Members of and Constituting the National Labor Relations Board, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

The Findings of Fact and Conclusions of Law and the Order of the United States District Court for the District of Columbia, dated September 22, 1959, are printed at Record pp. 40-44. The opinion of the Court of Appeals for the District of Columbia Circuit is reported at — F. 2d —, dated February 18, 1960, and is set out in Appendix A, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1960 (Appendix A., *infra*). The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254 (1).

QUESTIONS PRESENTED

Whether the members of the National Labor Relations Board have exceeded their statutory authority under Section 9(b)(2) of the Labor-Management Relations Act, as amended, 61 Stat. 136 (1947), 29 U.S.C.A. #141-68 (1958) by refusing to direct a craft unit election among certain employees of a paper box manufacturer on the ground, among others, that a different and broader bargaining unit has been established by a prior Board determination?

STATUTES INVOLVED

Section 9(b)(2) of the Act provides in pertinent part:

> "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not * * * (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation * * *."

Section 7 of the Act reads as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations,

to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3)."

STATEMENT OF THE CASE

This case involves a specific statutory prohibition against the denial of a craft unit election on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit have voted against separate craft representation. It presents the question directly of whether the Board may escape the requirements of the statutory prohibition when its reliance upon a prior determination is professed to be only one of several supporting factors which allegedly caused its decision.

Petitioners are the International Printing Pressmen and Assistants' Union of North America, AFL-CIO, and its Norwich, Connecticut Local 494, composed of some 350 members employed in the printing and paper converting industries in and around Norwich, Connecticut. (R. 3), hereinafter referred to jointly as the Pressmen.

The International Printing Pressmen and Assistant's Union of North America is an international labor organization created in 1889 for the purpose of advancing the economic and craft status of employees engaged in the operation of presses in the several divisions of the printing industry, primarily the newspaper, com-

mercial and specialty printing divisions. An affiliate of the AFL-CIO, it is composed of more than 126,000 members divided among some 600 subordinate local unions, including petitioner Local 494. (R. 4).

From 1945 until 1959 the International Printing Pressmen's Union through its subordinate Local 494, represented a bargaining unit composed of production and maintenance employees of the Montville, Connecticut plant of the Robertson Paper Box Company as a result of a Board determination that such a unit was appropriate for collective bargaining purposes following a Board conducted, consent election held in 1945. (R. 11, 41)

On or about December 15, 1958, Local 493 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America filed a petition for a representation election in the production and maintenance unit represented by the Pressmen. (R. 5) At the hearing on this petition the Pressmen intervened through the general counsel for the International Union in behalf of the International and its subordinate Local Union 494. Specifically, the Pressmen asserted that the craft employees constituted a craft group entitled to vote separately as to whether they desired separate representation on a craft basis or continued inclusion in the broader bargaining unit. (R. 5-7).

On March 2, 1959 the Board issued a Decision and Direction of Election in which it denied the craft employees of the Company an opportunity to express themselves in a separate voting group. This decision was expressly based upon the ground that the Pressmen had represented other employees along with the craft employees since 1945, and that therefore the

Pressmen's insistence upon a separate election within a craft unit was wholly inconsistent with its unit position in collective bargaining with the employer. The Board said that in such circumstances "it will not effectuate the purposes of the Act to permit the alleged craft severance which it now seeks." (R. 10-12).

On March 24, 1959, after the Board had denied petitioners' request for reconsideration of the earlier decision, the Pressmen instituted this suit, and on the same day the Honorable Matthew McGuire U. S. District Judge, after notice to the Board, issued a temporary restraining order enjoining the Board from conducting an election in the overall plant-wide unit theretofore found appropriate by the Board in its decision of March 2, 1959. (R. 19-20)

Thereafter the Board reopened the proceedings for the purpose of taking additional evidence on the issue of the propriety of a proposed craft unit of pressmen. On August 6, 1959, after further hearing, the Board issued a supplemental decision in which it adhered to its earlier view that a craft unit limited to the Company's pressmen was not appropriate. In this supplemental decision the Board undertook to distinguish between the International Union and its subordinate Local 494, finding that the *Local* "is not a craft union but an industrial union." (R. 35) It said that "additional supporting factors" for this conclusion included the fact that "(1) Local 494 itself represented the employees involved herein on an overall production and maintenance basis for 13 years prior to the instant petition." It pointed out that while the International had frequently been found by the Board to be a "traditional representative" of printing pressmen in the paper box industry entitled to craft severance, its subordinate

Local 494 was a "printing specialties and paper products local" and could not therefore qualify as the "traditional representative" of craft employees under the criteria established by the Board in its *American Potash and Chemical Corporation* decision, 107 NLRB 1418 (R. 35-37).

Promptly after issuance of the August 6, 1959 decision the Pressmen filed a supplemental complaint alleging that the Board's continuing refusal to grant a separate vote to the pressmen craftsmen employed by the Robertson Paper Box Company violated the prohibition of Section 9(b) (2) of the Act and asserting further that the grounds advanced by the Board in support of its decisions and the Board's adherence to a plant-wide unit finding were predicated solely on a prior Board determination. (R. 24-28).

In response the Board moved to dismiss the complaint on the ground that the District Court lacked jurisdiction of the subject matter and that the complaint failed to state a claim. (R. 40)

On September 22, 1959, the District Court, Honorable Alexander Holtzoff, Judge, denied the Board's motion to dismiss and granted the Pressmen's motion for a preliminary injunction. The Court found as a fact that "Plaintiff Local 494 has represented the production and maintenance employees of the Robertson Paper Box Company in an over-all plant unit since 1945 as a result of a Board conducted consent election." (R. 41) It further found that one of the factors which the Board cited in support of its conclusion that no separate craft election should be directed was that "Local Union 494 itself represented the employees herein in an overall production and maintenance basis

for 13 years prior to the instant petition." (R. 42) The District Court then concluded that the Board's refusal to direct a craft unit election was a direct violation of Section 9(b)(2) of the Act in that the Board was precluded thereby from "relying upon a prior determination as one of the reasons for the Board's decision not to direct a separate craft election, even though it may not be the sole basis for that decision." (R. 42)

After appeal by the Board, the United States Court of Appeals for the District of Columbia Circuit issued its decision, dated February 18, 1960, directing that the preliminary injunction issued by the District Court be set aside and that the case be remanded to the District Court with directions either to dismiss the complaint or to take such further action as not inconsistent with the opinion. (R. 63-68).

The opinion of the Court of Appeals correctly states that the issue is whether the Board in reaching its decision as to the appropriate unit disregarded any statutory limitation upon the discretion vested in the Board by section 9(b) of the Act; that is whether craft employees were denied a statutory right. (R. 64-65) It then reasoned, however, that even if the Board's first decision could properly be construed as based on the ground that a different unit had been established by a prior Board determination, thus violating the restraint imposed on the Board by section 9(b)(2), the supplemental decision "cured any such possible violation of that section." It cured any such defect because "The Board decision that the craft unit was inappropriate was not on the ground that a different unit had been established by a prior Board determination, but on the ground that the union seeking the craft unit was

not a traditional representative of a specific craft." (R. 5) In its view, the denial of a separate craft unit election on this ground was within the Board's discretion in applying its own *American Potash* doctrine, which, at least in words, restricts the right to seek craft elections to unions which traditionally represent craft groups. (R. 5-6)

The court below made no effort to come to grips with petitioner's argument and the District Court's conclusion that Section 9(b) (2) precludes the Board from relying upon a prior determination as one of the reasons for denying a separate craft election, nor the argument that Sections 7 and 9(b)(2) of the Act effectively prohibit the Board from administratively superimposing a "traditional representation" test upon the union invoking Section 9(b)(2) as a condition limiting the the right of craft employees to vote separately for craft representation.

This petition is filed seeking review of the erroneous decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals has decided a federal question in a way in conflict with this Court's decision in Leedom v. Kyne, 358 U.S. 184, thereby adversely affecting the statutory rights of millions of craft employees in the United States to separate craft elections without reference to prior Board determinations.

This Court's decision in *Leedom* v. *Kyne*, said in effect that the Board could not include professional and non-professional employees in the same bargaining unit absent an affirmative vote of the professional employees in a separate election among themselves. This was so because Section 9(b)(1) of the Act expressly prohibited such a commingling of employees without a separate election limited to the professionals.

Section 9(b)(2) of the Act, which follows the text of Section 9(b)(1), extends this same prohibition or interdiction to elections among craftsmen or employees in proposed craft units. This section prohibits the Board in mandatory language ("The Board shall not. . . .") from ruling a craft unit inappropriate on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation.

In this case the Board has conceded, both in its original and its supplemental decisions, and the District Court so found, that at least one of the reasons for refusing to direct a craft unit election is that a prior Board determination in a Board conducted consent election established a broader unit of production and maintenance employees. In the first Board decision of March 2, 1959, a craft unit was rejected because the union seeking such an election had bargained for a larger unit since 1945 pursuant to the Board's 1945 consent election. (R. 11, fn 3) In the supplemental Board decision of August 6, 1959 the Board said that one of three supporting factors which warranted its refusal to direct a separate craft unit election was that petitioner Local Union 494 had represented the employees involved in an overall production and maintenance unit since the 1945 election for 13 years prior to the present case. (R. 35) The District Court ruled that the Board had relied upon a prior determination as one of the reasons for its refusal to direct a separate craft election and hence its refusal to direct a vote in a craft unit was contrary to Section 9(b)(2) of the Act. (R. 42)

The Court of Appeals ignores these findings of the Board and the District Court and focuses its attention instead upon the Board's assertion that the union seeking the craft unit was not a "traditional representative" of a specific craft, and hence not entitled to represent craft employees under any circumstances.

We submit the Court of Appeals has evaded an issue of great consequence to the millions of employees who are craftsmen. If a tainted or illegal reason is one of the grounds for refusing a craft election, the Board cannot be absolved from violation of the statute by the simultaneous statement of other or supporting reasons.

The legislative history of Section 9(b)(2) of the Act shows plainly that it was intended to protect not craft unions, but craft employees. Indeed, one of the advocates of the provision said in the Congressional Record that "Both craftsmen and professional employees are protected by these amendments from having their wishes submerged by being thrown into a large unit of production and maintenance employees. This bill gives craftsmen and professional employees the right to vote in separate units."[1] Section 9(b)(2) was the legislative culmination of a long and bitter fight between the AFL craft unions, on the one hand and the CIO industrial unions on the other, and Congress intended to balance their bargaining powers, but it did not propose to do so by vesting statutory rights in unions as such. On the contrary it sought to protect craft employees in accordance with Section 7 of the Act in their right to choose any or no collective bargaining representative.

[1] Vol. 1, Legislative History of Labor Management Relations Act, 1947, Bureau of National Affairs.

The Court of Appeals, by accepting the Board's "traditional representation" test of whether a particular union may act for craft employees, reads into Section 9(b)(2) an impermissible condition; namely that Congress intended to protect the rights of craft unions instead of craft employees. The Board itself has rejected this specious logic on numerous occasions. See, for example, *Friden Calculating Machine Company, Inc.*, 110 NLRB 1618, where the Board held that a union newly organized for the purpose of representing craft employees satisfied the "traditional representative test" of *American Potash*; and *Lily Tulip Cup Corporation* v. *Leedom*, No. 17-RC-2983 (July 2, 1959) where the Board permitted a union which had never before sought to represent craftsmen to seek an election in a group of printing pressmen.

The Court of Appeals has not only erred in its assumption that Section 9(b)(2) allows the Board in its discretion to deny craft employees a right to a separate election because it questions the craft identity or qualifications of the union seeking the election; its acceptance of the Board's attempted distinction between the International Union and the subordinate Local Union is both hypertechnical and unrealistic. The Board conceded that the International Union met its "traditional representative" test, (R. 35) but argued that Local 494 did not because it had never before sought to represent craft employees separately. (R. 35-36) Aside from the fact that Local 494 has actually represented printing crafts at Montville, Connecticut for over 13 years as a result of a prior Board determination, it must be noted that the International and the Local are inseparable, coordinate entities, parent and child. They appeared at the hearing through the same counsel; the local is by definition subordinate to the International;

the "traditional representative" status of the International which is acknowledged by the Board, permeates the blood stream of the Local. As Judge Parker, speaking for the Fourth Circuit Court of Appeals, said in *National Labor Relations Board* v. *Libbey-Owens Glass Company*, 241 F. 2d 831 (1957), "the hypertechnicial argument that a distinction should be made in this regard between the I.B.E.W. and its local is so obviously lacking in merit as not to warrant discussion."

The policy expressed in *Leedom* v. *Kyne* was the culmination of twenty years of litigation over the statutory restraints upon exercise of Board discretion. In *American Federation of Labor* v. *Labor Board*, 308 U.S. 401 (1939), twenty years ago the Supreme Court reserved ruling on the question of whether a District Court could enjoin unlawful action of the Board in excess of its statutory authority, as distinguished from the right of review of Labor Board action by a Court of Appeals in an unfair labor practice proceeding where the issue involved possible arbitrary exercise of a discretion conferred on the Board by the statute. Six years later in *Inland Empire Council et al.* v. *Millis*, 325 U.S. 697 (1945), the Supreme Court called attention to its reservation in *AFL* v. *Board*, *supra* of the issue of whether apart from Section 10 proceedings, review of certification may be had by an independent suit brought pursuant to Section 24 of the Judicial Code. Then in a series of decisions, all preceding enactment of Taft-Hartley in 1947, this Court apparently upheld an almost unlimited exercise of Board discretion in representation proceedings. Largely as a result of these decisions, however, Congress in each instance added a specific and mandatory section to Taft-Hartley in order to limit the Board's discretion.

For example, in *NLRB* v. *Hearst Publications*, 322 U.S. 111, (1944), the Supreme Court upheld the Board's direction of an election among news vendors notwithstanding a company argument that such persons were in fact and and in law independent contractors. To meet the problem created by this decision Congress in new Section 2(3) of the 1947 Act added a proviso excluding persons having the status of independent contractors from the coverage of the Act, and in so doing Congress referred to the Board's *Hearst* decision by name. In *May Department Stores Co.* v. *N.L.R.B.*, 326 U.S. 376 (1945), the Supreme Court upheld the Board's discretion to establish a bargaining unit with no other justification than the union's ability to organize one segment of the employer's employees. This decision led to Section 9(a)(5) of the 1947 Act which mandatorily prohibits the Board from so doing. In *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947), the Supreme Court upheld a Board holding that foremen were entitled to select their collective bargaining representative under the statute. This led to Section 2(11) of the 1947 Act excluding supervisors from its coverage. Indeed, it can be concluded from these decisions that Congress inserted rigid and mandatory language in several sections of the 1947 Act, including Section 9(b)(2), for the specific purpose of restraining the Board's unlimited exercise of discretion.

Thus for the Court of Appeals to hold that the Board has discretion to read into the plain langauge of Section 9(b)(2) the qualification that the union seeking a craft election must be a traditional representative of the affected craftsmen, is to upset the entire statutory scheme, override clear Congressional purpose and ig-

more *Leedom v. Kyne* to the detriment not necessarily of craft unions, but of millions of craft employees throughout the United States. The fundamental right of these employees under Section 7 of the Act is to a choice between any union and no union; this right is not protected when the Board, in the guise of exercise of discretion, limits the choice to unions whose craft identification and tradition are approved by the Board and at the same time relies in part on a prior Board determination which it deems inconsistent with the present craft claims of the union.

II. The decision of the Court of Appeals for the District of Columbia Circuit is in conflict with the recent decision of the Court of Appeals for the Fourth Circuit in NLRB v. Pittsburgh Plate Glass Co., 270 F. 2d 167 (4th Cir. 1959), cert. den. —— U.S. ——.

There is a square conflict between the decision of the Court of Appeals for the District of Columbia Circuit in this case and the decision of the Fourth Circuit in *NLRB* v. *Pittsburgh Plate Glass Co.*, 270 F. 2d 167 (4th Cir. 1959), cert. den. —— U.S. ——. In the latter case on review of a final order of the Board pursuant to section 10(e) of the Act, the court held a true craft union which traditionally represented electricians was not entitled to bargain separately for craft employees in a highly integrated plant. Notwithstanding the traditional representative status of the craft union the Court found that the Board had applied its *American Potash* doctrine in an arbitrary and discriminatory manner since certain highly integrated industries were excluded from the application of the doctrine while other equally integrated industries were apparently covered.

Thus in *Pittsburgh Plate Glass*, one Circuit Court holds that even if the union seeking craft representa-

tion is a "traditional representative" within the meaning of that much abused term as set forth in *American Potash*, it may not bargain separately for the craft in a highly integrated industry despite victory in a separate election, because the Board has applied *American Potash* in an arbitrary and discriminatory manner. In this case the Court of Appeals for the District of Columbia Circuit takes the obverse of this proposition and says that a local union which is not a traditional representative, may not even seek a separate craft election.

The result of the two decisions, read together, is to riddle the *American Potash* doctrine full of legal holes. *American Potash* established two tests for entitlement to participation in separate craft elections: (1) existence of a true craft group and (2) a petition for a craft election filed by a union which had traditionally represented such groups. Now one Court of Appeals says the traditional representation test has no validity in a highly integrated industry because the Board itself applies this test arbitrarily among different industries, and another Court of Appeals rest its entire decision on the Board's administrative discretion to impose such a test as a condition to the exercise of rights conferred by Section 9(b)(2) of the Act.

The issue on which this conflict exists is plainly one of the utmost importance. If the District of Columbia Circuit is correct, the fact of traditional representation may be decisive of a case; if the Fourth Circuit is correct, traditional representation by a union seeking a craft election is meaningless. A failure to resolve this conflict in Circuit Court decisions will put in doubt the rights of millions of craft employees throughout the United States. It will cause endless confusion

among craft and industrial unions and employees as to the meaning of Section 9(b)(2) of the Act and the extent of the Board's jurisdiction under the statute.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for certiorari should be granted.

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